United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

028

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,162

GEORGE E. HILL, Jr.

Appellant

v.

THE UNITED STATES OF AMERICA

Appellee

Appeal from the United States District

Court for the District of Columbia - Criminal

Jean F. Dwyer for
Appellant
Appointed by this Court
602 Fifth Street, N.W.
Washington, D.C. 20001

STATEMENT OF QUESTIONS PRESENTED

I

Whether it was not error to deny defendant's timely motion for severance for trial purposes, when indictment, in three counts, accused defendant of housebreaking and robbery on September 23, 1966, and of robbery on November 7, 1966.

II

Whether it was not error to deny defendant's timely motion to suppress evidence and identification, when it appears that the arrest (for making major repairs on a public highway) was a pretext to get defendant into the precinct and hold there until he could be identified, not in a line-up, by complainant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1967

No. 21,162

GEORGE E. HILL, Jr.

Appellant

v.

THE UNITED STATES OF AMERICA

Appellee

An appeal from a criminal conviction in the United States District Court for the District of Columbia.

Jean F. Dwyer, for Appellant
By appointment of this Court
602 Fifth Street, N.W.
Washington, D.C. 20001

TABLE OF CONTENTS

INDEX OF CASES

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 2191, Title 28, United States Code. The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provision. An appeal was duly noted and perfected within the time limitations provided by the applicable statutes and Rules of this Court.

STATEMENT OF THE CASE

Appellant herein was indicted in January, 1967 for the crimes of housebreaking and robbery, allegedly occurring on September 23, 1966, and the crime of robbery, on November 7, 1966. All of the crimes were charged to have been perpetrated against Jumbo Food Stores, Inc., and their agent, Mr. Arthur Tino. Pre-trial motions for severance and to suppress evidence were denied.

The first Government witness, one Arthur Tino, testified that on September 23, 1966, he was manager of a Jumbo Food Store in the District of Columbia. Tino said that on that evening, after he had locked up for the night and gone to his car, he was approcahed by two men who drove him around for a time (in his car), and the, returning to the store, forced him to open the store and the safe, after which they fled with cash drawers containing in excess of four thousand dollars. The drawers were never recovered, nor the money traced. Tino

testified that the defendant was one of the two men, that he had seen him many times prior to the September 23 date, as he used to hang around the store. He did not tell this latter fact to the police when he reported the September 23 episode.

Mr. Tino further testified that early the morning of November 7, 1966, before the store opened for business, it was entered by two men, one of whom was wearing a gorilla mask, and the other a bandanna over his face. Tino was again required to open the safe, and the thieves fled with $1,280.00. He again said defendant was one of the two men; this time he claimed he told the police that he recognized the robber wearing the bandanna as someone he knew. However, there is no reflection of this in the police reports made at the time, nor any indication that Tino reported that one of the two robbers was the same man who had participated in the September 23 episode. Another witness who had been in the store on November 7 also identified defendant, although he had never seen him before, nor at any time between the November 7 robbery and the trial on April 27, 1967.

A Det. Wesley, M.P.D., testified that both the above witnesses "tentatively identified" the defendant from a group of pictures the morning of the November 7 robbery. (The picture identified was one taken of the defendant when he was 15 years old; it does not reflect a very conspicuous scar on his face, nor was such a scar mentioned by either witness in his report.) No warrant was issued.

On November 8, while Det. Wesley, in plain clothes, was alone in his cruiser, he arrested defendant for "making major repairs on a public highway". Although a number of people were present and assisting, only defendant was arrested. He was taken to the precinct, searched, and, although collateral was posted for him, he was held "for administrative procedures" until he was viewed (not in a line-up) by Mr. Tino. Defendant was then booked for the robbery of November 7. A car title and transfer document were seized from him when he was first brought into the precinct, and these were later admitted into evidence, over objection.

At the preliminary hearing, where Det. Wesley was the sole witness, no mention was made of any charge other than the one of November 7. The indictment containing charges relating to both dates was returned in January. Pre-trial motions to suppress evidence and sever the counts for purposes of trial were denied, both preliminarily and at the time of the trial.

During their deliberations, the jury indicated that they were unable to agree on two of the three counts. They asked that Mr. Tino's testimony be read to them, and this was done, over objection.

The defendant and his father testified as to his whereabouts at the time of the November 7 robbery; defendant testified that he had won the money for the car purchase gambling. He also testified that he learned of the September 23 charge so long afterward that he could not provide an alibi for it. He denied participating in either crime. He was convicted on all counts and sentenced to ten years.

STATUTES, TREATIES AND RULES

Title 22, District of Columbia Code, Section 1801: "Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any...store...with intent to break and carry away any part thereof or any fixture or any other thing attached to or connected with the same, or to commit any criminal offense shall be imprisoned for not more than fifteen years."

Title 22, District of Columbia Code, Section 2901: "Whoever by force and violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery."

Federal Rules of Criminal Procedure, as amended to July 1, 1966: Rule 8(a) "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Federal Rules of Criminal Procedure, do: Rule 14 "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires..."

Constitution of the United States, Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmations, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF POINTS

I

Appellant contends that it was clear error to deny his timely motion to sever the counts of the indictment, two of which related to events occurring on September 23, and one of which related to

events of November 7, 1966, when there was neither allegation or evidence of a common scheme or transaction, and where the joinder was clearly improper and prejudicial.

II

Appellant contends that it was clear error to deny his motion to suppress evidence, including identification testimony, since his arrest was made under circumstances which indicate that it was merely a subterfuge for the purpose of obtaining evidence as to the November 7 robbery.

SUMMARY OF ARGUMENT

Appellant says that under the relevant decisions from this and the Supreme Court, the denial of his motion to sever was clearly improper. This is especially true in view of the very dubious identification, made from a picture of him at 15 years of age, and resembling his appearnce during the relevant period only slightly. He contends that the evidence on all counts was not clearly convincing, and the trial of both dates together served to reinforce each against its own weaknesses.

II

Appellant says that denial of the motion to suppress under the circumstances of this case was improper. His arrest for "making major repairs" was, he contends, clearly a subterfuge to enable the detective to take him to the precinct and hold him. This contention is reinforced by the undisputed fact that, although a number of people

present and assisting, defendant was the only person arrested; and that, although collateral was posted promptly, he was not released promptly.

ARGUMENT

I

In this connection the Court will please read pages 3-4; 54-55; 395; 417.

Appellant contends that the joinder of counts in this indictment for trial purposes was clearly improper and prejudicial. He was originally charged with a robbery on November 7, 1966. He claims he was not advised, and counsel certainly was not aware, that anything further was pending until the indictment was returned in the latter part of January, at which time he was indicted not only for the November 7 episode, but for an alleged housebreaking and robbery on September 23.

It would seem there is no question but that for trial purposes the instant joinder of offenses falls squarely within the prohibition noted by this Court in Drew v. U.S., 118 U.S. App. D.C. 11, 331 Fed. 2d 85. To quote what counsel regards as the relevant language in Drew would mean reproducing the entire opinion almost verbatim, which seems pointless. Appellant would merely remind the Court that Drew involved a joinder quite similar to the instant one, and the Court, finding this prejudicial, reversed, with instructions to sever.

Some of the language from the somewhat more recent Gregory case (Gregory v. U.S., 125 U.S. App. D.C. 140, 369 Fed.2d 185, at 144) seems particularly in point in the light of the evidence here, to wit:

"Here there wasnot only the danger of the evidence with respect to the two robberies cumulating in the jury's minds tending to prove defendant guilty of each, but the evidence as to one of the robberies was so weck as to lead one to question its sufficiency to go to the jury. Thus its primary usefulness in this case was to support the Government case as to the robbery which resulted in the murder." That this was true in the instant case as well is indicated clearly by the note from thejury, p. 417, and by an examination of the testimony.

The evidence as to the first two counts came solely from the witness Tino, who at that time made no identification, nor, although the defendant had long been a customer and a frequenter of the store, did he tell the police that either of the robbers was anyone whom he had ever seen before. Even after he had made a "tentative identification" of the defendant's picture as a 15 year old, he was not shown a line-up, nor was the second witness to the November 7 crime. No precautions were taken to ensure an accurate and adequate identification. The Gregory language appears particularly appropriate here. It is clear that the danger the Court sought to guard against in voicing its opinion in Kidwell v. U.S., 38 App. D.C. 566, was clearly present here, e.g. "But it (joinder) should not be permitted where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists."

Appellant contends that he was clearly prejudiced by the joinder, and asks that the conviction be reversed, and the matter remanded with appropriate instructions.

II

In connection with this argument, the Court will please read pages 129, 131, 134, 140-41, 143, 157, 162, 167-8.

Appellant asserts that the circumstances surrounding his arrest were such as to tain everything which followed thereafter. In brief, the facts were that Det. Wesley had shown certain pictures to Tino and another identifying witness on the morning of the November 7 robbery. These pictures included one of the defendant as a 15 year old, at which time he had not acquired his conspicuous, although unmentioned scar. The witnesses made what the officer described as a "tentative identification" but it appears that this was not regarded as enough to justify applying for a warrant for the defendant's arrest.

On the following evening, while cruising in plain clothes, alone, Wesley saw a crowd around a car, and returned to investigate. He testified that defendant was alone in the car; a defense witness testified that defendant was in the passenger seat, and he, the witness, was in the driver's seat. It is undisputed that there were a number of people at the scene, attempting to help. Wesley placed defendant under arrest for "making major repairs on a public highway." (In fact, the car was lawfully parked, and the "major repair" was an attempt to attach booster cables to start a weak battery.) No one else present and participating in the work was arrested. Defendant was taken to the precinct, booked, and searched. A title and transfer were seized from him and introduced into evidence over defendant's objection. Although collateral was posted

promptly, defendant was held until Tino came down, saw him in custody (not in a line-up), at which time he was booked for the November 7 robbery. (Wesley testified he was held after collateral was posted for "administrative procedures"; a defense witness testified they were told he was being held for "someone else to talk to him".)

Appellant contends that this "arrest" falls squarely under the type of procedure prohibited in McKnight v. U.S., 87 U.S. App. D.C. 151, 183 Fed. 2d 977, and U.S. v. Lefkowitz, 285 U.S. 452, 52 S.C. 420, and other, similar cases. The situation in Taglavore v. U.S., 291 Fed.2d 262 (9th Circ.) appears especially in point. In that situation, a police official, following a narcotics raid, swore out a warrant for a minor traffic offense against appellant; in giving it to his officers to be served, he warned them to be on the look-out for suspected marijuana when they executed it. An arrest followed and some marijuana was forcibly recovered. In reversing the conviction, and ordering the evidence to be suppressed, the Court said "Where the arrest is only a sham or front being used as an excuse for making a search, the arrest itself and ensuing search are illegal", at p. 265, cases cited.

To similar effect is the language of this Court in White v. U.S., 106 U.S. App. D.C. 246, 271 F.2d 829. White was arrested in New York for vagrancy, admittedly a device used by N.Y. police to justify searches for suspected narcotics. In suppressing the stolen checks disclosed by this search, this Court pointed out that while the arrest itself was valid under all the circumstances, the search and its products were not.

Counsel's attempts to clarify the situation in this respect, out of the presence of the jury, were objected to by the Government, and the objections sustained, so that the record does not reflect whether Wesley habitually made such arrests, and whether it was in fact either normal or proper to hold defendant after the posting of collateral, or whether the "repair" itself came within the purview of the cited regulation.

What is clear from the record is that although a number of people were present on the scene, either assisting on the work on the car, or, according to Wesley, themselves impeding the road, only one arrest was made. And that was the arrestof the defendant by Wesley, who, purely by coincidence, of course, was the officer to whom, the day before, the "tentative identification" of the defendant as a robber was made.

Appellant urges that this arrest was a subterfuge and a sham, and that the resulting search and identification were improper and should be suppressed.

CONCLUSION

Appellant moves this Court to reverse his conviction, and remand the case with instructions to sever the counts of the inidctment, and to suppress the evidence and identification.

Jean F. Dwyer, for Appellant by
Appointment of this Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was delivered to the office of the U.S. Attorney for D.C. this 30th day of January, 1968.

Jean F. Dwyer

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,162

GEORGE E. HILL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
R. KENLY WEBSTER,
LAWRENCE LIPPE,
Assistant United States Attorneys.

Cr. No. 58-67

QUESTIONS PRESENTED

1. Did two District judges each abuse his discretion in denying appellant's motion to sever two of the three charges against him from the third?

2. Did the trial court err in denying appellant's motion to suppress when the evidence sought to be suppressed was recovered pursuant to an arrest for a violation committed in the presence of the arresting officer?

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,162

GEORGE E. HILL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed on January 16, 1967, appellant was charged in two counts with robbery (22 D.C. Code § 2901) and in one count with housebreaking (22 D.C. Code § 1801). A motion to compel severance of one of the robbery counts from the other charges was heard and denied on March 3, 1967. Trial before District Judge Smith began on April 27, 1967. On May 4, 1967, the jury returned a verdict of guilty as indicted. Pursuant to 18 U.S.C. § 5010(c), appellant was sentenced to imprisonment for ten years on each count, the sentences to run concurrently. This appeal ensued.

At the outset of the trial, appellant's motion for severance was renewed and denied (Tr. 3-4). The Govern-

ment's first witness, Mr. Arthur G. Tino, testified that he was manager of the Jumbo Food store located at 3041 Naylor Road, S.E. On September 23, 1966, the store closed at 9:00 p.m. as it did every evening. Mr. Tino was the last one to leave and it was about 9:45 p.m. when he walked to his car which was parked nearby. (Tr. 14, 60.) Noticing that two men were approaching him, he hurried to his car and tried to start the motor. The two men came up to him, told him not to start the car and ordered him to open the door. Mr. Tino complied when he observed one of the men point a gun at him. The two men entered the vehicle and told him to place his hands over his eyes. They had placed their hands over their faces. As one of the men held a gun up to Mr. Tino's head, the other drove the car around for about thirty minutes and then parked in the rear of the Jumbo store. (Tr. 15-17, 57, 61.) Mr. Tino was told to unlock the alarm system, enter the store and open the safe. One of the men was holding a gun at Mr. Tino's back as they got out of the car. Mr. Tino did what he was told and he and the two men entered the store through the front door. The safe was located in an office built slightly above the store floor on a platform. Mr. Tino unlocked the office door and one of the men entered with him.[1] The safe, which had an upper and lower door, each of which had its own combination lock, was locked. Although there was no light turned on in the office, lights left on in other parts of the store provided enough light to enable Mr. Tino to manipulate the combination locks and open each of the safe's doors. Money in tills from the cash registers and food stamps were kept in the top part of the safe. A cash box containing money was in the bottom part. The robbers took all of the money and the food stamps which amounted to approximately four thousand dollars.[2]

---

[1] Mr. Tino testified that he remembered only the man who went into the office with him and that at trial he was still under the impression that only one robber entered the office (Tr. 55).

[2] The robbers also took the tills and the cash box. Neither these items nor the money or foodstamps were ever recovered. (Tr. 52.)

Mr. Tino was then told to lie down and the robbers fled. He called the police immediately. (Tr. 16-24.)

At the trial, Mr. Tino positively identified appellant as the robber who entered the office with him. He stated that he had seen appellant in his store on at least a dozen prior occasions. (Tr. 24-25, 55-56.) When the police arrived, Mr. Tino told them that appellant was between approximately five feet-ten inches and six feet tall, weighed approximately 170 pounds and had a medium complexion (Tr. 51-52, 57).

Mr. Tino testified further that on the morning of November 7, 1966, at about 7:30 a.m., he was in his store. With him in the store were the porter, the produce manager and a Mr. Ronald Mitchell was making a bread delivery. The store was not open to the public until 9:00 a.m. (Tr. 25-27.) Mr. Tino was standing in his office[3] when someone told him to open the door. He then saw a man wearing a bandana over his mouth and tip of his nose pointing a gun at him. Mr. Tino opened the door and the man with the gun entered the office. Both doors of the safe were open and he demanded that Mr. Tino give him all the money. Mr. Tino observed another man with a gun standing on the store floor near Mr. Mitchell. The robber who entered the office took approximately twelve hundred and eighty-five dollars and then fled with the other gunman. The hold-up lasted approximately five minutes. (Tr. 28-33, 67.) At the trial, Mr. Tino positively identified appellant as the robber who entered the office and took the money from the safe (Tr. 32). When the police arrived, Mr. Tino described appellant as being between five feet-ten inches to six feet tall and weighing approximately 170 pounds and having a medium complexion (Tr. 68, 79). He also told the police that the same person had robbed him on September 23 and that

---

[3] It was in this same office that the safe was located on September 23, 1966, the date of the previous robbery. A person standing on the store floor can see if anyone is in the office since the partitions that comprise the office walls do not extend to the ceiling. (Tr. 63-64.)

he recognized him as a result of having seen him often in the store on previous occasions (Tr. 68, 71-72). Mr. Tino saw appellant at the precinct the following evening and identified him as one of the robbers. Appellant was asked to repeat the words used by the robber who entered the office on November 7, and Mr. Tino said that he thought appellant's voice was the same as that robber's. (Tr. 69-75.)

Earl Campbell testified that on the morning of November 7, 1966 at about 7:30 a.m. he was cleaning the floor of the store when suddenly he was told to move. He was then hit on the head and knocked unconscious by a man wearing a gorilla mask. He did not see the robbers enter the store and although he did observe one of them in the office with Mr. Tino, he could not tell what he looked like. (Tr. 80-83.) The Government's next witness was Mr. Ronald Mitchell who stated that on the morning of the November 7 robbery he was making a bread delivery to the Jumbo Food store. As he walked outside to his truck to get some bread a man wearing a bandana which covered the bottom part of his face from the nose down came up to him, pulled out a gun and told him to get back into the store. Another man wearing a gorilla mask and holding a gun in his hand came into the store and hit the porter on the back of his head when he hesitated in responding to one of the robber's demands. Mr. Mitchell observed the man wearing the bandana go straight to the manager's office, stick his gun in the manager's face and demand that he open the door. The manager complied and the robber stepped into the office. The other robber remained on the store floor. (Tr. 83-86.) At trial Mr. Mitchell identified appellant as the robber who wore the bandana. He stated that he had never seen either robber before the hold-up and had not seen appellant again until the trial. At the time of trial, appellant's hair was the same length and had the same straight line in front across the forehead as the hair of the robber who wore the bandana. Immediately after the robbery, Mr. Mitchell described appellant to the police as being between

five feet-ten inches to six feet tall, weighing between 165 to 185 pounds and having a light-medium complexion. He estimated that appellant was in his early twenties. (Tr. 86-93).[4]

Before the Government called its next witness, George R. Wesley, who identified himself as a plainclothesman assigned to the Metropolitan Police Department Criminal Investigation Division on detail to Number 11 Precinct, appellant's counsel asked for a hearing out of the presence of the jury. Counsel for appellant indicated that she would object to the receipt in evidence of certain documents found on appellant after his arrest on the evening following the November 7 robbery. Officer Wesley testified at the hearing as appellant's witness and stated that on November 7 he showed photographs to Mr. Tino and Mr. Mitchell and each of them, when shown a picture of appellant, stated that he looked like one of the robbers. He considered these to be "tentative" identifications. (Tr. 128-129.) No warrant was obtained for appellant's arrest (Tr. 134). Later that same day he took Mr. Tino and Mr. Mitchell to the robbery squad office and the case was assigned to an officer of that squad (Tr. 133). On the following day, Officer Wesley worked the 4 p.m. to 12 p.m. tour of duty. While riding alone in his police cruiser on a four-lane, two-way street, Officer Wesley noticed a crowd of people standing around a parked, 1959 Cadillac automobile. Some of them were standing in the roadway, blocking traffic. He saw a breather cap,[5] some tools including some wrenches, and other parts of the automobile's carburetor lying in the lane of traffic adjacent to the automobile. The parts and tools were blocking traffic. (Tr. 134-138, 153-156.) Officer Wesley turned his car around and drove towards the parked car. It was not until Officer Wesley got out of his cruiser and approached the parked Cadillac that he observed appellant seated alone in the car. Prior to this he had recognized no one.

---

[4] Appellant was born July 7, 1947 (Tr. 163, 193-195).

[5] A breather cap is part of the carburetor and is 18 inches in diameter (Tr. 154).

he recognized him as a result of having seen him often in the store on previous occasions (Tr. 68, 71-72). Mr. Tino saw appellant at the precinct the following evening and identified him as one of the robbers. Appellant was asked to repeat the words used by the robber who entered the office on November 7, and Mr. Tino said that he thought appellant's voice was the same as that robber's. (Tr. 69-75.)

Earl Campbell testified that on the morning of November 7, 1966 at about 7:30 a.m. he was cleaning the floor of the store when suddenly he was told to move. He was then hit on the head and knocked unconscious by a man wearing a gorilla mask. He did not see the robbers enter the store and although he did observe one of them in the office with Mr. Tino, he could not tell what he looked like. (Tr. 80-83.) The Government's next witness was Mr. Ronald Mitchell who stated that on the morning of the November 7 robbery he was making a bread delivery to the Jumbo Food store. As he walked outside to his truck to get some bread a man wearing a bandana which covered the bottom part of his face from the nose down came up to him, pulled out a gun and told him to get back into the store. Another man wearing a gorilla mask and holding a gun in his hand came into the store and hit the porter on the back of his head when he hesitated in responding to one of the robber's demands. Mr. Mitchell observed the man wearing the bandana go straight to the manager's office, stick his gun in the manager's face and demand that he open the door. The manager complied and the robber stepped into the office. The other robber remained on the store floor. (Tr. 83-86.) At trial Mr. Mitchell identified appellant as the robber who wore the bandana. He stated that he had never seen either robber before the hold-up and had not seen appellant again until the trial. At the time of trial, appellant's hair was the same length and had the same straight line in front across the forehead as the hair of the robber who wore the bandana. Immediately after the robbery, Mr. Mitchell described appellant to the police as being between

five feet-ten inches to six feet tall, weighing between 165 to 185 pounds and having a light-medium complexion. He estimated that appellant was in his early twenties. (Tr. 86-93).[4]

Before the Government called its next witness, George R. Wesley, who identified himself as a plainclothesman assigned to the Metropolitan Police Department Criminal Investigation Division on detail to Number 11 Precinct, appellant's counsel asked for a hearing out of the presence of the jury. Counsel for appellant indicated that she would object to the receipt in evidence of certain documents found on appellant after his arrest on the evening following the November 7 robbery. Officer Wesley testified at the hearing as appellant's witness and stated that on November 7 he showed photographs to Mr. Tino and Mr. Mitchell and each of them, when shown a picture of appellant, stated that he looked like one of the robbers. He considered these to be "tentative" identifications. (Tr. 128-129.) No warrant was obtained for appellant's arrest (Tr. 134). Later that same day he took Mr. Tino and Mr. Mitchell to the robbery squad office and the case was assigned to an officer of that squad (Tr. 133). On the following day, Officer Wesley worked the 4 p.m. to 12 p.m. tour of duty. While riding alone in his police cruiser on a four-lane, two-way street, Officer Wesley noticed a crowd of people standing around a parked, 1959 Cadillac automobile. Some of them were standing in the roadway, blocking traffic. He saw a breather cap,[5] some tools including some wrenches, and other parts of the automobile's carburetor lying in the lane of traffic adjacent to the automobile. The parts and tools were blocking traffic. (Tr. 134-138, 153-156.) Officer Wesley turned his car around and drove towards the parked car. It was not until Officer Wesley got out of his cruiser and approached the parked Cadillac that he observed appellant seated alone in the car. Prior to this he had recognized no one.

---

[4] Appellant was born July 7, 1947 (Tr. 163, 193-195).

[5] A breather cap is part of the carburetor and is 18 inches in diameter (Tr. 154).

(Tr. 155-157.) The officer posed a general question to the crowd with respect to who owned the car and who was making the repairs on a public road. Appellant responded that the car was his and that he was making the repairs. Appellant was then arrested and booked for making major repairs on a roadway.[6] (Tr. 136-137.) The arrest book for Number 11 Precinct indicates that appellant was booked for the traffic violation at 8:20 p.m. (Tr. 147-148, 152). Collateral, which was eventually forfeited by appellant, was posted by one of appellant's friends (Tr. 141, 164). Appellant was not, however, permitted to leave. Some of appellant's friends who had come to the precinct after his arrest created confusion and interruptions and as a result, Officer Wesley had not been able to complete the required administrative procedures which included preparation of the "line-up" sheet and processing of appellant through the identification bureau.[7] (Tr. 141-143.) It was apparently during this time that Mr. Tino arrived at the precinct and identified appellant as one of the robbers.[8] The arrest book reflects

---

[6] Officer Wesley was correct in his belief that appellant was committing a misdemeanor in his presence. He was mistaken, however, in his belief that appellant had violated a police regulation. (Tr. 139, 156-157.) Appellant's conduct violated the Traffic and Motor Vehicle Regulations for the District of Columbia, Part I, which reads in pertinent part as follows:

> Sec. 81. Parking Car for Certain Purposes Prohibited
>
> No person shall park a vehicle upon any roadway for the principal purpose of:
>
> (a) * * *
>
> (b) Greasing, or repairing such vehicle except minor repairs necessitated by an emergency.

A conviction for violation of this regulation can result in a sentence of imprisonment for ten days, a fine of $300.00, or both.

[7] A person arrested on any charge can be placed in a line-up and processed through the police department identification bureau. Officer Wesley testified further that it had always been his experience that persons arrested for this offense were processed through the identification bureau. (Tr. 142-144.)

[8] Mr. Tino testified that he went to the precinct that evening right after receiving a phone call from Officer Wesley requesting him to go to the precinct (Tr. 69).

that appellant was booked for robbery at 9:09 p.m. that same evening (Tr. 147-148, 152.)

Immediately after appellant arrived at the precinct he was asked to empty his pockets as part of the routine booking procedure. Appellant placed on a table two documents relating to his title and ownership of the Cadillac. He moved to suppress these documents as evidence primarily on the grounds that they were seized pursuant to a "sham" arrest. (Tr. 168.) The trial judge ruled that the arrest was valid and denied appellant's motion [9] (Tr. 172).

Trial in the presence of the jury was resumed and officer Wesley testified that at the time he arrested appellant on November 8, appellant had in his possession several title documents relating to a 1959 Cadillac automobile. These papers indicated that appellant had purchased the Cadillac the day before for $375.00 which amount appellant paid in cash. (Tr. 173-178.) The Government then rested its case. Appellant's counsel stated that she moved for judgment of acquittal as to each count and renewed her motion to sever the charges. Each motion was denied. (Tr. 179-180.)

Officer Wesley was called as appellant's first witness and stated that at the time of appellant's arrest on November 8 he had less than twenty dollars on his person.

---

[9] During the hearing, Richard Gray, a friend of appellant, testified that he was seated behind the steering wheel and appellant was beside him in the passenger's seat when Officer Wesley approached them. He stated that they had battery trouble, could not start the car and were about to use some borrowed "jumper" cables to start the car. The breather cap, according to Mr. Gray, was in the open trunk of the car. He denied that there were any tools or automobile parts in the street. When Officer Wesley approached them, they had not yet hooked up the "jumper" cables. He stated that none of the persons who were gathered near the car were standing in the roadway. (Tr. 160-165, 167.)

Officer Wesley testified that he saw no jumper cables anywhere near the vehicle and that no nearby car was in position to enable such an operation to be performed (Tr. 136). Mr. Gray admitted that he had been convicted for the offenses of Unauthorized Use of a Vehicle, Robbery, Unlawful Entry and Petit Larceny (Tr. 165-166).

He could not recall if appellant had a mustache or goatee when he was arrested but did state that appellant had a scar on his face at the time. In response to further questions by appellant's counsel, Officer Wesley stated that on November 7, shortly after the robbery, he showed photographs to Mr. Tino and Mr. Mitchell. Each "tentatively" identified a picture of appellant as being that of one of the robbers. The picture was taken four years prior to the robbery when appellant was fifteen years old. (Tr. 186-187, 190-191, 193-195.) The prosecutor then elicited from the witness that he showed between 75 and 100 photographs to Mr. Tino and Mr. Mitchell and that neither of them indicated that any photograph other than that of appellant was the robber. The "tentative" identifications consisted of each man stating that appellant's picture "look[ed] like the one who was the person . . . who robbed the Jumbo." (Tr. 196-198.) Officer Wesley showed the photographs to each man separately, neither man was near the other during the viewing and Officer Wesley did not tell either man which picture the other had picked out (Tr. 206).

George Hill, appellant's father, testified that on the morning of the November 7 robbery appellant was still in bed between 7:00 and 7:30 a.m. He stated that his wife, appellant, and he lived together in an apartment building where he was the janitor. Appellant's mother woke appellant that morning before she went to work but appellant did not get out of bed until approximately 8:00 a.m. Appellant who had no job at the time helped his father clean the incinerator that day. (Tr. 217-224.) He stated that on November 8 he informed Officer Wesley that appellant was in bed at home the previous morning. He denied telling Wesley that he didn't know where appellant was on the morning of the robbery. (Tr. 226-227.)

Appellant testified that he did not participate in the September 23 robbery of the Jumbo Food store. He stated that on November 8 he was informed that he was being charged only with the November 7 robbery and that he

did not know that he would be charged with the September 23 robbery until he received his copy of the indictment which was returned on January 16, 1967. He was unable to give an account of his whereabouts on September 23. (Tr. 246-248.) Appellant stated that he was home in bed at the time of the November 7 robbery (Tr. 246, 303-304). Later that same day, appellant purchased the Cadillac automobile for $375.00, which amount he paid in cash. Although he had no job at the time of either robbery, appellant stated that he was able to pay for the car with money he had won gambling. (Tr. 264-276, 250, 253, 260.) The Cadillac had an automatic transmission and appellant stated that he did not know how to drive an automobile with a standard, "stick-shift" transmission. (Tr. 254-257.) Appellant further stated that he was between five feet-nine and five feet-ten inches tall and weighed 192 pounds at the time of trial. He admitted that he had been gaining weight and that he may have weighed as little as 160 pounds during the spring of 1966. (Tr. 252-253.) Appellant had a scar on his face since 1965 and had a mustache and goatee at the time of the robberies (Tr. 249).

After appellant rested his case the Government called Mr. Tino in rebuttal. He stated that it was appellant who, on September 23, approached his car on the driver's side, pointed a gun at him and told him to move over. Appellant got into the car on the driver's side and jerked the car while attempting to start it. Mr. Tino's car had a standard "stick-shift" transmission and appellant cursed the car because he couldn't drive it. (Tr. 311-312.) The other robber then moved into the driver's seat and drove. He stated further that when he picked out appellant's photograph on November 7, Mr. Mitchell was nowhere near him (Tr. 313-315).

Officer Wesley testified that on November 8 he told appellant that Mr. Tino had identified him as being involved in both robberies.[10] He stated that appellant's

---

[10] On November 8, appellant was booked for the November 7 robbery (Tr. 187). Officer Wesley explained that it is general

father said that he did not know where appellant was at the time the November 7 robbery took place. (Tr. 319-320.) Officer Edwin Goodall then testified that he was present at Number 11 Precinct on the evening of November 8 and that he heard Officer Wesley tell appellant that he had been identified as being involved in both robberies. Officer Wesley specified the times and place of each robbery. (Tr. 339-340.) Appellant's counsel then renewed "for the record" all previous motions and objections and they were denied (Tr. 395).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

---

practice to book a multiple offender for only one of several serious offenses and to let the Grand Jury "pick up" the other offenses at the appropriate time (Tr. 332).

Rule 8(a), Federal Rules of Criminal Procedure, provides:

> *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

SUMMARY OF ARGUMENT

I

Appellant has failed to sustain his burden of demonstrating that the trial judge and the motion judge before him abused their discretion in denying the motion for a severance of the charges. The two counts relating to one robbery and the one count relating to another robbery were properly joined as "similar crimes." The evidence in support of each robbery was strong. Each of the crimes was closely connected to the other by time, place, and circumstance. The evidence was such that evidence of each robbery would have been admissible in a separate trial of the other to establish appellant's identity. Additionally, the evidence as to each incident was simple and distinct. Appellant has failed to show any prejudice resulting from the joinder.

II

The issue of sham arrests is one for inference to be drawn by the fact-finder based upon credibility and demeanor, and the trial judge found, after holding a hearing on the issue, that the arrest of appellant was valid and not a sham. The evidence that supports this finding shows that an officer, on routine patrol, observed tools and major parts of an automobile's carburetor lying in a lane of traffic next to a parked car. The officer, who recognized no one until he approached the car arrested

appellant for making major repairs on a public road when he learned that the car belonged to appellant and that it was he who was making the repairs. As appellant was being booked for the traffic offense, the officer recovered some documents relating to appellant's recent purchase of a car, which documents appellant sought to suppress at trial. There is nothing in the record to indicate "sham" with respect to the arrest. Nor was it improper to permit appellant to be viewed by the victim of two robberies while he was being booked for the traffic offense.

ARGUMENT

I. Neither the judge hearing appellant's motion to sever prior to trial nor the trial judge abused his discretion in denying the motions for severance.

(Tr. 24-25, 32, 51-52, 55-57, 68-75, 193-198, 252-253, 313-315, 319, 339-340, 407-408)

Judge Jones, prior to trial, and Judge Smith at trial, each denied appellant's motion to sever the counts of the indictment. In the instant case, the joinder of the two robbery counts and one housebreaking count was not error, let alone plain error affecting substantial rights of appellant. Count 1 charged appellant with breaking into a Jumbo Food store on September 23, 1966 with intent to steal. Count 2 charged that appellant committed robbery on September 23, 1966 by taking approximately $4,000.00 in money which belonged to Jumbo Food Stores, Inc. and which was in the possession of Mr. Arthur Tino. Count 3 alleged that appellant committed robbery on November 7, 1966 by taking approximately $1,280.00 in money belonging to Jumbo Food Stores, Inc. which was in the possession of the same Mr. Arthur Tino. These offenses involve, essentially, hold-ups within six weeks of each other of the same store and the taking of money owned by the same corporation which was in the custody of the same person. The counts are clearly of the same or similar character as specified in Rule 8(a), Fed. R. Cr. P. The joinder of these offenses was not error. See

Gray v. *United States*, 123 U.S. App. D.C. 39, 356 F.2d 792 (1966); *Daly* v. *United States*, 119 U.S. App. D.C. 353, 342 F.2d 932 (1964), *cert. denied*, 382 U.S. 853 (1965).

Appellant's fundamental objection to the joinder is that the Government's evidence in support of the two counts relating to the September 23 robbery was weak and that the jury may have used the evidence adduced in support of the November 7 count to convict appellant for the inadequately proven September 23 offense. Appellant's Br. at 9-10. This argument is without merit.

Firstly, at trial, Mr. Tino positively identified appellant as the September 23 robber who entered his office, stating that he had seen appellant in his store on at least a dozen previous occasions. His description of the robber's height, weight and complexion given to the police after the robbery substantially matched appellant's actual description. It was appellant who Mr. Tino identified as being the robber who approached his car and told him to open the door and move over. And it was this same man who was unable to drive Mr. Tino's standard transmission car just as appellant admitted at trial he was unable to do. On November 7 Mr. Tino informed the police that the man who entered his office during the second robbery was involved in the first robbery, that he recognized him as a result of having seen him in the store on numerous previous occasions and on the same day Mr. Tino tentatively identified a photograph of appellant as being that person. When Mr. Tino saw appellant the following evening at the precinct he positively identified him as being involved in each of the robberies. (Tr. 24-25, 32, 51-52, 55-57, 68-75, 193-198, 252-253, 313-315, 319, 339-340.) This can hardly be characterized as "weak" evidence. Compare *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966).

Secondly, under the circumstances of this case, evidence of one of the robberies would have been admissible in a separate trial for the other. This Court stated the

applicable rule in *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964) as follows:

> If, . . . under the rules relating to other crimes, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of "criminal propensity" prejudice would be in no way enlarged by the fact of joinder . . . [I]f the facts surrounding the two or more crimes on trial show that there is a reasonable probability that the same person committed both crimes due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed, the evidence of one would be admissible in the trial of the other to prove identity. In such cases the prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials. *Id.* at 16, 331 F.2d at 90 (footnotes omitted).

After the first robbery, the robbers knew that Mr. Tino was the store manager, that his office was located on a raised platform in the store and that the safe was located in that office. On the occasion of the second robbery, just six weeks later, the robber identified as appellant went straight to the same office and demanded that Mr. Tino open the door even though other persons were present in the store. Appellant knew on November 7 that the safe which Mr. Tino knew how to open, if necessary, was located in the office on the platform. A gun was carried by appellant and he had an accomplice on each occasion. Mr. Tino, victim of both robberies, referred to one of the November 7 robbers (appellant) as being one of those who committed the September 23 robbery. His identification of appellant with respect to the November 7 robbery was, in part, stated in terms of his long familiarity with appellant and appellant's involvement in the September 23 robbery.

In short, appellant, armed and aided each time by an accomplice, robbed the same store and the same manager twice in the short span of six weeks. The knowledge of

the location of the store's safe he gained after perpetrating the first robbery enabled him to unhesitatingly proceed straight to the right person and location in the store during the second robbery. Mr. Tino could hardly be called upon at trial to identify appellant as a participant in one robbery without referring to his similar participation in the other. We think it clear, therefore, that evidence of one offense would have been admissible at a separate trial of the other on the issue of identity. See *Gray* v. *United States*, *supra*.

Thirdly, ". . . even [if] the evidence would not have been admissible in separate trials, if, from the nature of the crimes charged, it appears that the prosecutor might be able to present the evidence in such a manner that the accused is not confounded in his defense and the jury will be able to treat the evidence relevant to each charge separately and distinctly, the trial judge need not order severance or election at the commencement of the trial." *Drew* v. *United States*, *supra*, at 17-18, 331 F.2d at 91-92. In the instant case, the jury could not have confused the evidence as to the two hold-ups since the evidence as to each incident was simple and distinct. Appellant can demonstrate no confusion. Additionally, the trial judge was careful to instruct the jury as follows:

> A separate offense is charged in each of the counts of the indictment which you are to consider. Each offense, and the evidence applicable thereto, should be considered separately. The fact that you may find the defendant guilty or not guilty on any one count of the indictment should not control or influence your verdict with respect to any other count or counts of the indictment. (Tr. 407-408.)

It is well settled in this jurisdiction that separate crimes may be joined if a defendant can be fairly tried on all charges at once. Public policy considerations in the administration of justice require that severance be denied in the absence of a clear showing of prejudice against which the trial court will not be able to afford

protection. This determination is in the sound discretion of the trial court subject to review only for clear abuse. *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 31 (1954). Appellant has failed to make such a showing.

II. Appellant was booked and searched pursuant to a lawful arrest for an offense he committed in the presence of the arresting officer.

(Tr. 134-137, 141-144, 153-157)

A police officer has statutory authority to arrest without a warrant persons committing an offense in his presence or view. 4 D.C. Code § 140; *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F.2d at 964, *cert. denied*, 382 U.S. 894 (1965). Of course, a "sham arrest" which is used as a pretext to conduct a search for evidence of another offense cannot validate the search. *Taglavore* v. *United States*, 291 F.2d 262 (9th Cir. 1961). But when the issue of "sham arrest" is posed, as it was by appellant at trial, it is "one for inference to be drawn by the fact-finder based upon credibility and demeanor." *Hutcherson*, *supra*, at 282, 345 F.2d 972; *Johnson* v. *United States*, 125 U.S. App. D.C. 243, 244, 370 F.2d 489, 490 (1966). This issue of sham arrest was litigated at trial and found against appellant. At one stage of the trial, the trial judge commented that the arresting officer had been a completely candid and fair witness (Tr. 367).[11]

The testimony of Officer Wesley, if credited as it was by the trial court, showed that a quantity of tools and major parts of an automobile's carburetor were lying in a lane of traffic next to a parked car. He also observed a crowd of people standing around the car. It was ap-

---

[11] Upon review by an appellate court the trial court's findings of fact should not be disturbed unless they are "clearly erroneous." *Dillane* v. *United States*, D.C. Cir. No. 20,571, decided September 1, 1967; *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965).

parent that someone was making repairs on the vehicle and this was a clear violation of a traffic regulation. The automobile parts, tools and some of the people were blocking traffic. It was a responsible officer's duty to investigate the situation. When Officer Wesley ascertained that the vehicle belonged to appellant and that he was making the repairs he had the authority to arrest appellant. After appellant's lawful arrest, he was in valid custody and it was unquestionably proper to make him empty his pockets as part of the routine booking procedure just as it is lawful to conduct a contemporaneous search of appellant as incident to the arrest. *Preston* v. *United States*, 376 U.S. 364, 367 (1964); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508 (1960).

Nothing in the record indicated that Officer Wesley deliberately planned the arrest as a pretext for assuming control over appellant. In fact, inasmuch as he did not recognize anyone when he saw evidence of repairs and first approached the car, any inference in this regard is to the contrary. It was not until after he had alighted from his own car and walked to where appellant's car was parked that he learned that the car upon which the repairs were being made was owned by appellant and that it was he who was making the repairs. (Tr. 134-137, 153-157.) Nor was there any indication that Officer Wesley knew that a confrontation with appellant would reveal the documents appellant sought to suppress at trial.

Appellant's reliance on *Taglavore*, *supra*, is inapposite for as this Court noted in *Hutcherson*, *supra*, there (referring to *Taglavore*) "it plainly appeared that the officers deliberately planned the arrest as a pretext for search for marijuana which they believed the defendant had in his possession. *Id.* at 277, 345 F.2d at 967. In *Taglavore*, the traffic violation occurred the night before the arrest; appellant there was not stopped then because the officer, a member of the vice squad, claimed to be busy doing other things. A warrant for appellant's arrest for the traffic violation was given to two other officers who were told that there was an excellent chance

that appellant would have marijuana cigarettes on his person when they arrested him. This combination of delay and knowledge that appellant would probably have contraband or incriminating items on his person is not here present.

The fact that Officer Wesley knew that appellant had been tentatively identified as a perpetrator of two robberies in no way invalidates the traffic arrest made while he was on routine patrol. As Judge Burger, concurring in *Hutcherson, supra,* wrote:

> When a police officer observes overt criminal conduct and makes an arrest, the fact that the officer suspects other violations not manifest at the time, such as illegal possession of narcotics, weapons or stolen goods, is totally irrelevant. *Id.* at 278, 345 F.2d at 968.

And once appellant was in lawful custody, it was certainly proper, indeed his duty, for Officer Wesley to call Mr. Tino to the precinct to view appellant. Appellant remained in custody after his collateral was posted only because of delays in the routine booking procedures and confusion which were occasioned by appellant's friends (Tr. 141-144).[12]

---

[12] Nowhere in the record does it appear that appellant moved to suppress anything but the title documents as being seized pursuant to a sham arrest. For the first time on this appeal, appellant, as an apparent afterthought, moves to suppress the precinct identification on the grounds that it was facilitated and occasioned by a sham arrest. Indeed, at trial, appellant made no objection whatsoever to testimony relating to Mr. Tino's identification of appellant at the precinct. Appellant should be foreclosed from now raising this issue. *Schmerber* v. *California,* 384 U.S. 757, 765 n.9 (1966).

In any event, if appellant's arrest was for any reason unlawful—and we do not think it was—we do not think testimony relating to the pre-trial identification would be inadmissible. *Payne* v. *United States,* 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied,* 368 U.S. 883 (1961), presents an analogous situation. Payne was identified by his victim while he was being illegally detained contrary to Rule 5(a). Payne claimed that this witness was thereby precluded from identifying him in the courtroom. Payne argued, as appellant could here, that but for the unlawful detention he

Appellant's real complaint would appear to be that a responsible and alert police officer enforced the law as to a less serious offense, resulting in discovery of items that pointed to his guilt of far more serious offenses.

---

could have drifted back into the general populace and not been identified at all. This Court rejected that contention, stating:

> * * * The consequence of accepting appellant's contention in the present situation would be that the [witness] would be forever precluded from testifying against [the appellant] in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified [appellant] as the robber. *Such a result is unthinkable.* The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. (Emphasis supplied) *Id.* at 98, 294 F.2d at 727.

We are not unaware that in *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958), this Court held that fingerprints taken during a period of unlawful arrest were improperly admitted at trial. But we think *Bynum* is a case limited to its facts and does not apply to identifications. "[T]o the extent that *Bynum* suggests that a conviction must be reversed because the prosecution used illegally obtained evidence even though the same evidence could have been legally obtained after the violation, it has been questioned. See *Kennedy* v. *United States*, [122 U.S. App. D.C. 291, 292 n.3, 353 F.2d 462, 463 n.3 (1965)]." *Lewis* v. *United States*, —— U.S. App. D.C. ——, ——, 382 F.2d 817, 819 (1967). This Court has treated the question presented here as open. *Cooper* v. *United States*, 118 U.S. App. D.C. 30, 331 F.2d 776 (1963), *cert. denied*, 379 U.S. 865 (1964). One court, so far as we can determine, has spoken on the question and supports the position we urge. In dictum the Court of Appeals for the Ninth Circuit said in *D'Argento* v. *United States*, 353 F.2d 327, 333 (1965), *cert. denied*, 384 U.S. 963 (1966):

> An arrest may prevent the use of evidence seized for that particular offense for which the arrest was made but the identity of the person, his description, the description of his car and its license number are all matters that are observable to an alert intelligent officer. . . . All evidence offered was that of identification.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
R. KENLY WEBSTER,
LAWRENCE LIPPE,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 293943 653